UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BENNIE DIXON, Plaintiff, v. CITY OF SAN DIEGO, et al., Defendants.	Civil No. 06-2027-JAH(LSP) SECOND REPORT AND RECOMMENDATION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. # 59)

On December 12, 2006, Plaintiff Bennie Dixon (hereafter "Plaintiff") filed a First Amended Complaint pursuant to 42 U.S.C. §1983 alleging that his civil rights were violated. Plaintiff's First Amended Complaint also contains causes of action for battery, false arrest, negligence and emotional distress. On December 8, 2008, Defendants Mark Taylor (hereafter "Taylor"), Patrick Sullivan (hereafter "Sullivan"), and Brandie Sorbie (hereafter "Sorbie") (hereafter collectively "Defendants") filed a Motion for Summary Judgment (hereafter "Motion"). Plaintiff did not file an Opposition to the Motion. On January 16, 2009, the Court issued a Report and Recommendation Granting Defendants' Motion. Unbeknownst to the undersigned, on January 16, 2009, Plaintiff attempted to file an

Opposition to the Motion. On January 22, 2009, the District Judge assigned to this case allowed Plaintiff to file a Motion for Denied Access To The Courts, which presents arguments and evidence in opposition to the Motion (hereafter "Opposition"). On February 2, 2009, the District Judge assigned to this case denied Plaintiff's Motion for Denied Access To The Courts and declined to adopt the January 16, 2009 Report and Recommendation so that the undersigned could consider the arguments and evidence in opposition to the Motion, as presented by Plaintiff. On February 11, 2009, Defendants filed a Reply to Plaintiff's Opposition.

The Court, having reviewed the First Amended Complaint, the Motion, Plaintiff's Opposition, Defendants' Reply and the exhibits attached thereto and GOOD CAUSE APPEARING, HEREBY RECOMMENDS that the Motion for Summary Judgment be GRANTED.

I

STATEMENT OF FACTS

In the early morning of March 9, 2005, uniformed San Diego Police Officer Sullivan received a radio call to investigate a battery with a deadly weapon at Elizabeth Freese Elementary School located at 8140 Greenlawn Drive. (Declaration of Patrick Sullivan at 2, ll. 3-7)(hereafter "Sullivan Dec.")

A school custodian, Manuel Hernandez (hereafter "Hernandez"), had been attacked earlier that morning by a man with a three-foot stick, causing bruising to Hernandez' back. As the suspect was walking out of the school, he also threatened with the stick Julia Pacheco (hereafter "Pacheco"), another school employee. The suspect was described as a black male with a bald head, clean shaven and wearing a black jumpsuit with a white stripe running down the sides.

(Sullivan Dec. at 2, ll. 3-7, Declaration of Brandie Sorbie at 2, ll. 3-6, hereafter "Sorbie Dec.")

Plaintiff alleges that prior going to the school, he was being chased by a group of Hispanic gang members. He alleges that he "ran lost" into the school's parking lot with a small piece of lumber in his hand. (Opposition at 1a) Plaintiff alleges that he feared for his life when he encountered Hernandez, who spit on him and exposed a box cutter with which he believed Hernandez would hurt him. Thereafter, he asserts that he hit Hernandez in self-defense. (Opposition at 1a-2)

Soon thereafter, a black male fitting the suspect's description was spotted walking on Imperial Avenue, a short distance from Freese Elementary School. The male, later identified as Plaintiff, was walking in the direction of a park carrying a stick and striking at weeds with the stick. [Sullivan Dec. at 2, ll. 9-14, Report of Johnson (hereafter "Johnson Rpt.")]

Uniformed San Diego Police Officer Michelle Johnson (hereafter "Johnson") approached Plaintiff first as Plaintiff was sitting on the ground barefoot, leaning against a building with his shoes and socks lying on the ground next to him. A large stick was also lying next to Plaintiff. Johnson commanded Plaintiff to put his hands in the air in order to see if he had anything in them, but Plaintiff said "What for?" and then tried to reach for the stick. (Sorbie Dec. at 2, ll. 13-18, Johnson Rpt., attached to the Declaration of Sergeant Paul Salas)[1] [Plaintiff's First Amended Complaint at 4, 5(ii)-(iv)]

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[1] Johnson is no longer a San Diego Police Officer and was not served with this lawsuit. She has not been located to provide a declaration. Sergeant Paul Salas approved Johnson's Rpt.

Johnson kicked the stick out of Plaintiff's reach and then grabbed onto his arm and ordered him to stand up. Plaintiff stood up quickly with his feet braced apart and his hands clenched into fists. He swung his clenched left fist at Johnson's face. Johnson dodged Plaintiff's fist and took out her expandable baton, which she then used to strike Plaintiff on his arms. (Johnson Rpt., Sorbie Dec. at 2, ll. 17-18)

Uniformed Officer Sorbie arrived just before the struggle between Plaintiff and Johnson ensued. Sorbie saw Plaintiff stand up and attempt to strike Johnson with his clenched fist. Sorbie joined in the effort to take Plaintiff into custody. Plaintiff continued to swing his arms at Johnson as Sorbie assisted in gaining control of him. (Sorbie Dec. at 2, ll. 13-21, Johnson Rpt.)

Subsequently, Uniformed Officer Taylor arrived and tried to take Plaintiff into custody as Plaintiff continued to resist, kick and flail. [Declaration of Mark Taylor at 2, ll. 13-20, (hereafter "Taylor Dec."), Sorbie Dec. at 2, ll. 21-26, Sullivan Dec. at 2, ll. 11-14]

Sullivan arrived at the scene and the four Officers were finally able to handcuff Plaintiff after striking several blows of their batons to Plaintiff's thighs. (Taylor Dec. at 2, ll. 16-20, Sullivan Dec. at 2, ll. 16-20, Sorbie Dec. at 2, ll. 24-26, Johnson Rpt.)

After Plaintiff calmed down, he identified himself. At a curbside line-up, Pacheco identified Plaintiff as the man who had threatened her with a stick earlier that day. She positively identified Plaintiff's stick as the weapon Plaintiff had used to threaten her. (Sorbie Dec. at 2, ll. 1-6, Sullivan Dec. at 2, ll.

21-24, Johnson Rpt.)

After Plaintiff was taken into custody, he began making strange statements about snakes around his ankles. Also, he behaved oddly by making sudden and jerky movements. Johnson transported Plaintiff to County Mental Health for a psychiatric evaluation and learned that Plaintiff had recently been released from a 24 or 26 day incarceration at the County Jail. (Johnson Rpt., Sorbie Dec. at 3, ll. 1-6, Sullivan Dec. at 2, ll. 21-24)

Plaintiff's First Amended Complaint, viewed as an affidavit in support of an opposition to the motion (see discussion below) and Opposition do not contain facts that materially differ from Defendants' account of Plaintiff's arrest, other than he alleges (albeit without the required factual specificity) that Defendants' actions amounted to unprovoked excessive force against him, that Sullivan delivered blows to him that are not mentioned above, that Defendants were not competently trained and lacked experience, that Defendants did not provide him with a "Force Effectiveness" form of Johnson, and that the San Diego Police Department is, in some way, corrupt. Plaintiff does not state facts showing that he resisted arrest. Nor does he state facts showing that Defendants' acts were unprovoked nor unjustified under the circumstances.

On September 21, 2007, the Court of Appeal, in affirming Plaintiff's convictions arising from the incident described above, essentially found the same facts as does this Court. (Opposition at Appendix A)

II

STANDARD FOR SUMMARY JUDGMENT

Fed.R.Civ.P. 56(c) authorizes the granting of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for the granting of a directed verdict. Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). However, "[i]f reasonable minds could differ," judgment should not be entered in favor of the moving party. Id.; see also Blankenhorn v. City of Orange, 485 F.3d 463, 470 (9th Cir. 2007) ("If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.") (alteration omitted).

The parties bear the same substantive burden of proof as would apply at a trial on the merits, including plaintiff's burden to establish any element essential to his case. Liberty Lobby, 477 U.S. at 252; Celotex v. Catrett, 477 U.S. 317, 322 (1986); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

The moving party bears the initial burden of identifying the elements of the claim in the pleadings, or other evidence, which the moving party "believes demonstrates the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323; Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir. 1982). "A material issue of fact is one that

affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). More than a "metaphysical doubt" is required to establish a genuine issue of material fact. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. Celotex, 477 U.S. at 324. To successfully rebut a properly supported motion for summary judgment, the nonmoving party "must point to some facts in the record that demonstrate a genuine issue of material fact and, with all reasonable inferences made in the plaintiff[]'s favor, could convince a reasonable jury to find for the plaintiff[]." Reese v. Jefferson School Dist. No. 14J, 208 F.3d 736, 738 (9th Cir. 2000) (citing FED.R.CIV.P. 56; Celotex, 477 U.S. at 323; Anderson, 477 U.S. at 249); see also Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007) (noting that the non-moving party may defeat summary judgment if she makes a showing sufficient to establish a question of material fact requiring a trial to resolve)

Here, Plaintiff has filed a verified First Amended Complaint and an Opposition to the Motion. A verified complaint or motion may be used as an opposing affidavit under FED.R.CIV.P. 56. Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995 (complaint); McElyea v. Babbitt, 833 F.2d 196, 197-98 (9th Cir. 1987) (complaint); Johnson v. Meltzer, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (motion). Plaintiff's First Amended Complaint is based on personal knowledge and sets forth some facts that may be admissible in evidence.

Fed.R.Civ.P. 56(e); Schroeder, 55 F.3d at 460. Thus, the Court may consider it as an opposing affidavit under Fed.R.Civ.P. 56.

However, "'a verified complaint may serve as an affidavit for purposes of summary judgment [only] *if* [1] it is based on personal knowledge and if [2] it sets forth the requisite facts with specificity.'" California Pro-Life Council v. Randolph, 507 F.3d 1172 (9th Cir. 2007) [quoting Moran v. Selig, 447 F.3d 748, 760 n.16 (9th Cir. 2006) (citation omitted)] (emphasis added).

III

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT

1. Qualified Immunity

Defendants contend that summary judgment is proper because they are entitled to Qualified Immunity in that they did not violate Plaintiff's constitutional rights. Plaintiff does not oppose Defendants' contention.

Qualified immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Anderson v. Creighton, 483 U.S. 635, 640 (1987)

"In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." Saucier v. Katz, 533 U.S. 194 (2001).

"Qualified immunity is 'an entitlement not to stand trial or

face the other burdens of litigation.'" Saucier, 121 S.Ct. at 2156 [quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)] The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Mitchell, 472 U.S. at 526. Thus, the Supreme Court has "repeatedly... stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam).[2]

"A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the office's conduct violated a constitutional right? This must be the initial inquiry." Saucier, 121 S.Ct. at 2156 [citing Siegert v. Gilley, 500 U.S. 226, 232 (1991)] "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id.

"On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. Thus, "the right the official is alleged to have violated must

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[2] "[Q]uite aside from the special concerns regarding the need for early resolution of matters concerning immunity, litigants are ordinarily entitled to resolution of their summary judgment motions through a determination whether there are material facts in dispute regarding the elements necessary to establish liability." Paine v. City of Lompoc, 265 F.3d 975, 984 (9th Cir. 2001) (citation omitted).

have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. (citing Anderson, 483 U.S. at 640). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. (citing Wilson v. Layne, 526 U.S. 603, 615 (1999) ["(A)s ... explained in Anderson, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." Id. at 2156-57 [citing Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law.")]

42 U.S.C. §1983 permits a person to maintain a cause of action against a person acting under color of state law who violates that person's constitutional rights. An arrest triggering the protection of the Fourth Amendment occurs when the arrest is "without probable cause or other justification." Dubner v. City & County of San Francisco 266 F.3d 959, 964 (9th Cir. 2001) A showing of probable cause is a defense to a claim for false arrest. Arpin v. Santa Clara Valley Trans. Agcy. 261 F.23d 912, 920 (9th Cir. 2001)

To state a claim of excessive force under §1983, Plaintiff bears the burden of establishing that the defendant acting under color of state law violated his rights under the Fourth Amendment by using unreasonably excessive force during the arrest. Graham v.

O'Connor 490 U.S. 386, 396 (1989) Plaintiff's constitutional rights are not violated if the amount of force used in the arrest is "objectively reasonable." That is, if the force used was necessary "in light of the facts and circumstances confronting the police officers," without regard to their intent of motivation. Id. at 397 Since the reasonableness test "is not capable of precise definition or mechanical application," it must be applied carefully considering "the facts and circumstances of each particular case," taking into account several factors such as (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Id. at 396

(a) Defendants' Arrest of Plaintiff was Factually and Objectively Reasonable

Here, the evidence possessed by Defendants at the time of the arrest support a finding that Defendants had probable cause to arrest Plaintiff. Plaintiff fit the description of the assailant at Freese Elementary School that Defendants had been given. Plaintiff was contacted a short distance from the school. He was observed carrying a stick that fit the description of the weapon used to attack Hernandez and threaten Pacheco. Therefore, based on the victims' descriptions, Plaintiff's possession of a stick and Plaintiff's proximity to where the battery occurred at the time he was contacted, it was objectively reasonable for Defendants to detain Plaintiff.

After Defendants contacted Plaintiff, he refused to comply with their orders to stand up and raise his arms. Instead, he

became violent by trying to strike Johnson. Plaintiff's violent attempts to assault Johnson constituted Plaintiff's willful resisting arrest and obstructing a police officer in the performance of her duties.

Plaintiff does not dispute these facts, other than to allege that the radio dispatches to the officers regarding the description of the assailant were inaccurate, "were just stirring up trouble," [First Amended Complaint at 5(i)] and that the actions of Defendants amounted to excessive force. Plaintiff does not explain how the radio dispatches were inaccurate, or how such inaccuracy affect his claims. Nor does Plaintiff present specific facts to conclude anything other than that Defendants' arrest of him was objectively reasonable.

(b) Defendants' Use of Force Was Factually and Objectively Reasonable

In order to determine whether the force used to arrest was reasonable under the circumstances, courts balance the "nature and quality of the intrusion of the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham 490 U.S. at 396.

In the context of qualified immunity and subsequent to Saucier, supra, the Ninth Circuit found no violation of a constitutional right and no excessive force used in the arrest of a plaintiff who was sprayed with a chemical irritant, pushed to the ground to handcuff her, roughly pulled up to her feet and placed in a police car with the windows rolled up in 90 degree heat. Even though the plaintiff's finger was broken during her handcuffing, the court found that the "nature and quality of the alleged intrusions

were minimal" under the circumstances of the arrest. Jackson v. City of Bremerton 268 F.3d 646, 652 (9th Cir. 2001) Since the court did not find a violation of a constitutional right, it did not proceed to the second step of the qualified immunity inquiry.

Here, after an analysis of the circumstances present at the time of Plaintiff's arrest and the factors stated in Graham, the Court concludes that Defendants were justified in using force on Plaintiff to arrest him. Plaintiff fit the description of a suspect who had allegedly hit and threatened with a stick two people at Freese Elementary School, and was found carrying a stick that matched the description of the stick used in the assaults. After Plaintiff was contacted by Defendants, he refused to comply with their orders and became violent. He posed an immediate threat to Defendants' safety by attempting to reach for the stick after one of the officers asked him to put his hands up, and then by attempting to strike the officers with his fists and feet as they were trying to take him into custody. By acting the way Plaintiff did, he actively resisted and tried to evade arrest. Therefore, all of the Graham factors were met. As a result, the force used on Plaintiff to arrest him was objectively reasonable.

Since the Court has found that Defendants' actions in arresting Plaintiff were objectively reasonable, there is no necessity for further inquiries regarding qualified immunity. Saucier 121 S.Ct. at 2156, Jackson 268 F.3d at 652, fn. 5. Defendants are entitled to qualified immunity and did not violate Plaintiff's constitutional rights. As a result, the Court RECOMMENDS that Defendants' Motion for Summary Judgment be GRANTED.

IV

When a court dismisses federal claims before trial, it should dismiss ancillary state law claims as well. United Mineworkers v. Gibbs 383 U.S. 715, 726 (1966).

Plaintiff filed this action in this Court on the basis of allegations of violations of his civil rights under 42 U.S.C. §1983. Since the Court has found that Defendants did not violate Plaintiff's constitutional rights and are entitled to qualified immunity, the Court RECOMMENDS that the remaining state law claims for battery, false arrest, negligence, emotional distress and violation of Cal. Civ. Code §52.1 be DISMISSED.

V

CONCLUSION AND RECOMMENDATION

The Court, having reviewed Plaintiff's First Amended Complaint, Defendants' Motion for Summary Judgment and the declarations filed in support thereof, and GOOD CAUSE APPEARING, HEREBY RECOMMENDS that:

1. Defendants' Motion for Summary Judgment be GRANTED;

2. Plaintiff's remaining state law claims be DISMISSED.

This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. § 636(b)(1).

IT IS ORDERED that no later than March 17, 2009, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall

be filed with the Court and served on all parties no later than April 17, 2009. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 17, 2009

Hon. Leo S. Papas
U.S. Magistrate Judge